RELEVANT DOCKET ENTRIES

		Filing Date
Arizona Superior Court for Apache County		
1.	Complaint (Claim for Refund of Income Tax)	June 17, 1969
3.	Motion to Dismiss	July 14, 1969
18.	Amended Complaint (Claim for Refund of Income Tax)	Nov. 5, 1969
19.	Motion to Quash Amended Complaint	Nov. 10, 1969
31.	Order of Dismissal and Judgment	Jan. 12, 1970
33.	Notice of Appeal	Jan. 14, 1970
37.	Amended Opinion and Order	Jan. 23, 1970
Arizona Court of Appeals		
35.	Order; Court's Opinion (Affirmed)	Apr. 28, 1971
44.	Appellants' Petition for Review by the Supreme Court of the State of Arizona	June 22, 1971
50.	Minute Entry from Arizona Supreme Court, September 21, 1971, #10576-PR: Petition for leave to File Amicus Curiae Brief = GRANTED. FURTHER Petition for Review = DENIED	Sept. 22, 1971
52.	Notice of Appeal to the Supreme Court of the United States; Affidavit of Service (Received September 28, 1971)	Oct. 5, 1971

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

ROSALIND McCLANAHAN,
Individually And On Behalf
of All Others Similarly
Situated,
Plaintiff,

vs.

THE STATE TAX COMMISSION OF
ARIZONA,
Defendant.

No. 4370

AMENDED
COMPLAINT
(CLAIM FOR
REFUND OF
INCOME TAX)

The Plaintiff, individually and on behalf of all others similarly situated, by and through her attorney, states her claim against the Defendant as follows:

I

The Plaintiff is a Navajo Indian residing on the Navajo Indian Reservation, within the confines of Apache County. The Defendant is the agency empowered to administer the income tax laws of the State of Arizona.

II

During the calendar year 1967 the Plaintiff's employer withheld, as required by Arizona law, from compensation earned by the Plaintiff, the sum of sixteen dollars and twenty-nine cents ($16.29), for and as Arizona income tax, and the Plaintiff's employer paid the same to the Defendant.

III

On or about April 1, 1968, the Plaintiff filed an Arizona State Individual Income Tax Return (Form 140) for the

calendar year 1967 with the Defendant and simultaneously therewith filed a written protest of the collection of any tax on the Plaintiff's income by the Defendant and a written claim for refund of the entire sum withheld from Plaintiff's wages. The Plaintiff's alleged Arizona state income tax liability was eleven dollars and eighty-four cents ($11.84). A true copy of Plaintiff's claim for refund is attached hereto as Exhibit "A", and incorporated herein by this reference. The Defendant has never refunded the said sum to the Plaintiff.

IV

The grounds upon which the Plaintiff protested the said tax and claimed refund of the funds withheld and paid by her employer, as required by Arizona law, are as follows:

(a) The Plaintiff is a Navajo Indian, and

(b) The Plaintiff resided within the confines of the Navajo Indian Reservation during the entire calendar year 1967, and

(c) The Plaintiff's income during the calendar year 1967 was derived from sources within the Navajo Indian Reservation.

V

The Plaintiff's refund claim which was filed on or about April 1, 1968, was neither granted nor denied by the Defendant. On or about October 4, 1968, the Plaintiff considered her claim disallowed and appeared to the Defendant Tax Commission, at which time her counsel appeared before the Defendant Tax Commission, on her behalf, and on behalf of all others similarly situated, and presented her appeal. At the hearing before the Defendant, the Plaintiff claimed refund upon the same grounds set forth in paragraph IV, above. The Plaintiff has received no notice of any determination of her refund claim and appeal thereof and is informed and believes that none has been made by the Defendant and therefore considers her claim disallowed by the Defendant.

VI

The Plaintiff is not subject to the assessment, collection or retention of Arizona tax upon her income because

(a) She is a Navajo Indian, and

(b) She resides, and at all times material hereto has resided, within the confines of the Navajo Indian Reservation, and

(c) Her income during the calendar year 1967 was derived from sources within the confines of the Navajo Indian Reservation, and

VII

Plaintiff is a member of a large class of persons who are Navajo Indians, living and working on the Navajo Indian Reservation, whose income the Defendant Tax Commission claims the power and jurisdiction to tax. The Plaintiff sues on their behalf in a representative capacity because:

(1) The class is so numerous that joinder of all members is impracticable,

(2) The questions of law raised by this action are common to the class and the questions of fact are typical of those which could be raised by all members of the class,

(3) The claims of the Plaintiff are typical of the claims of the class,

(4) The plaintiff in her representative capacity will fairly and adequately protect the interests of the class,

(5) The prosecution of separate actions by individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendant Tax Commission,

(6) The questions of law and fact presented in this action

common to all members of the class, predominate over any questions affecting only individual members, and

(7) A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

VIII

The funds expended by the State of Arizona in the provision of services and benefits to the plaintiffs, in the form, for example, of welfare assistance, education and highway construction or maintenance, are derived in large proportion from federal sources and programs established for the benefit of Reservation Indians. These federal programs are a fulfillment of the Federal government trust responsibility for Indians, and are administered by the State of Arizona, in effect, as agent for the Federal government.

IX

The government of the Navajo Tribe provides services and benefits to the plaintiffs at an annual cost of approximately $16,000,000. The funds to bear such costs are derived wholly from tribal sources.

X

The Defendant's attempted exercise of the power to tax the Plaintiff's income is an infringement upon the right of the Navajo Indians to govern their own affairs, to maintain their own political, social and economic independence and to maintain their own culture.

WHEREFORE, the Plaintiff, for herself, and on behalf of all others similarly situated, prays that the Court:

1. Grant judgment to the Plaintiff and against the Defendant Tax Commission for the full amount of her claim for refund, plus interest at the rate of six per cent per annum from December 31, 1967, and

2. Enter an order on behalf of all persons who are members of the said class, declaring it unlawful for the Defendant Tax Commission to refuse to grant their claims for refund, plus interest, and to continue to collect or assess tax upon their income, and

3. Such other and further relief as to the Court seem proper.

/s/ Theodore R. Mitchell

Theodore R. Mitchell, Counsel
For Plaintiff

Address:
Dinebeiina Nahiilna Be Agaditahe
Post Office Box 368
Window Rock, Arizona 86515
602/871-4151

I hereby certify that a Copy
of the foregoing Amended Complaint
was mailed this 4th day of November,
1969, to:

James D. Winter
Assistant Attorney General
State Capitol Building
Phoenix, Arizona

OPINION OF THE SUPERIOR COURT OF ARIZONA, COUNTY OF APACHE

See Jurisdictional Statement, Page No. 11a

OPINION OF THE ARIZONA COURT OF APPEALS

See Jurisdictional Statement, Page No. 2a

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROSALIND MCCLANAHAN, Individually and On Behalf of All Others Similarly Situated, *Appellant,* v. THE STATE TAX COMMISSION OF ARIZONA, *Appellee.*	1 CA-CIV 1316 DEPARTMENT B APACHE County Superior Court No. 4370 ORDER

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the opinion be sent to each party appearing herein or the attorney for such party, and to THE HONORABLE D. L. GREER, Judge.

DATED this 28th day of April, 1971.

EINO M. JACOBSON
PRESIDING JUDGE

A true copy of the foregoing order was mailed this 28th day of April, 1971, to:

Mr. Bruce Bridegroom
P. O. Box 460
Window Rock, Arizona
86515
Attorney for Appellant

Mr. Donald Juneau

Dinebeiina Nahiilna
Be Agaditahe
Post Office Box Nine Sixty-Seven
Shiprock, New Mexico 87420
Attorney for Appellant

Mr. James D. Winter
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007
Attorney for Appellee

The Honorable D. L. Greer
Courthouse
St. Johns, Arizona 85936

Mr. Theodore R. Mitchell
P. O. Box 306
Window Rock, Arizona 86515

CLASSIE GANTT, Clerk
By Glenna L. Denton
Deputy Clerk

ORDER OF THE ARIZONA SUPREME COURT
DENYING PETITION FOR REVIEW

See Jurisdictional Statement, Page No. 1a

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

INDEX

	Page
INTRODUCTORY	1
THE OPINIONS BELOW	2
STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED	2
QUESTIONS PRESENTED BY THE APPEAL	4
STATEMENT OF THE CASE	4
THE QUESTIONS ARE SUBSTANTIAL	6
CONCLUSION	17
APPENDIX A — MEMORANDUM DECISION OF THE SUPREME COURT OF ARIZONA	12
APPENDIX B — OPINION OF THE ARIZONA COURT OF APPEALS	2a
APPENDIX C — OPINION OF THE SUPERIOR COURT OF ARIZONA IN AND FOR THE COUNTY OF APACHE	11a

TABLE OF AUTHORITIES CITATIONS

Cases Page

Arizona ex rel. Merrill v. Turtle, 413 F.2d 983 (9th Cir. 1969), *cert. denied* 396 U.S. 1003 (1970) ..9, 10, 11

Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1966)..... 18

Board of Commissioners v. Seber, 318 U.S. 705 (1943)..... 14

Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906)..... 10

Carpenter v. Shaw, 280 U.S. 363 (1930)..... 14

Cherokee Nation v. Georgia, 5 Pet. 1 (1831)..... 3, 8

Choate v. Trapp, 224 U.S. 665 (1912)..... 13, 14

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)..... 13

Choteau v. Burnet, 283 U.S. 691 (1931)..... 14-15

Commissioner of Revenue v. Brun, 286 Minn. 43, 174 N.W. 2d 120 (1970)..... 11

Donahue v. California Justice Court, 15 Cal. App. 3d 579, 93 Cal. Rptr. 310 (1st Dist. 1971)..... 18

Ex Parte Crow Dog, 109 U.S. 556 (1883)..... 9

Guss v. Utah Labor Board, 353 U.S. 1 (1957)..... 14

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956)..... 9, 10

Johnson & Graham's Lessee v. McIntosh, 8 Wheat. 240 (1823)..... 12

Kansas Indians, 5 Wall. 737 (1867) 3, 8-9, 13

Kennerly v. Montana District Court, 400 U.S. 423 (1971)..... 3, 9, 16

CITATIONS (Continued)

Cases Page

Leahy v. State Treasurer of Oklahoma, 297 U.S. 420 (1936) 14, 15
Littell v. Nakai, 344 F.2d 468 (9th Cir. 1965), *cert. denied* 382 U.S. 986 (1966) 9
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 13
Makah Indian Tribe v. Clallam County, 73 Wash.2d 677, 440 P.2d 442 (1967) 11
Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), *cert. denied* 356 U.S. 960 (1958) 9
Maryland Casualty Co. v. Citizens National Bank, 361 F.2d 517 (5th Cir. 1966) 9
McClanahan v. State Tax Commission, 14 Ariz. App. 452, 484 P.2d 221 (1971) ..2, 6, 10, 13-14, 17
McCulloch v. Maryland, 4 Wheat. 316 (1819) 10
Morris v. Hitchcock, 194 U.S. 384 (1904) 10
Oklahoma Tax Commission v. United States, 319 U.S. 598 (1936) 14, 15
Pourier v. Board of Commissioners, 83 S.D. 235, 157 N.W.2d 532 (1969) 11
Sohol v. Clark — Wash.2d —, 479 P.2d 925 (1971) 11
Squire v. Capoeman, 351 U.S. 1 (1956) 18
Stephens v. Cherokee Nation, 174 U.S. 445 (1899) 12
Talton v. Mayes, 163 U.S. 376 (1896) 9
United States v. Daney, 370 F.2d 791 (10th Cir. 1966) ...13, 18
United States v. Forness, 125 F.2d 928 (2d Cir. 1942), *cert. denied sub nom.* City of Salamanca v. United States, 316 U.S. 694 (1942) 13
United States v. Holliday, 3 Wall. 407 (1866) 13
United States v. Kagama, 118 U.S. 375 (1886) 12
United States v. Quiver, 241 U.S. 602 (1916) 9
United States v. Rickert, 188 U.S. 432 (1903) 14

CITATIONS (Continued)

Cases Page

Ward v. Board of County Commissioners, 253 U.S. 17 (1920) 14
Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1956) 3, 12, 18
Williams v. Lee, 358 U.S. 217 (1959) 3, 7, 10, 13, 15
Worcester v. Georgia, 6 Pet. 515 (1832) 3, 8, 12

Federal Statutes and Treaties

18 U.S.C. §1331 13
18 U.S.C. §1360 13
20 U.S.C. §§239-41; 631-45 16
23 U.S.C. §120(a) 16
25 U.S.C. §231 13
25 U.S.C. §§452-55 16
25 U.S.C. §461 15
25 U.S.C. §§1301 *et. seq* 16
25 U.S.C. §1323(b) 16
25 U.S.C. §1326 16
28 U.S.C. §1257(2) 3
Treaty of 1868 between the United States of America and the Navajo Tribe of Indians, 15 Stat. 667 ..... 2, 4, 5, 7
Arizona Enabling Act, 36 Stat. 557 (1910) 5
Act of June 18, 1934, c. 576, §1, 48 Stat. 984 15
Act of August 15, 1953, c. 505, §§6, 7, 67 Stat. 590 7
Act of August 15, 1953, c. 505, 67 Stat. 588, 589 *as amended* by Act of August 24, 1954, c. 910, 68 Stat. 795 ..... 9, 13
Act of August 8, 1958, 72 Stat. 545 13
Pub.L. 85-470, 72 Stat. 834 (1958) 16
82 Stat. 77 (1968) 16

Arizona Constitutional Provisions and Statutes

Arizona Constitution, Art. XX 5

CITATIONS (Continued)

Cases Page

Arizona Revised Statutes
§43-102(a) 3
§43-184(g) 5
§43-186(d) 2
§43-188(f) 5
§43-191 11

Statutes of the Navajo Tribe
1 Navajo Tribal Code, Title 5, §§701-704; 731-34; 761-76; 841-43; 871-73; 901-12 10-11

OTHER AUTHORITIES

Agnew, Spiro, Remarks, Los Angeles Times, Mar. 9, 1971, §1, at 16 cols. 1, 2 17

Comment, *The Indian Battle for Self-Determination*, 58 Calif. L. Rev. 445 (1970) 12

Fannin, Paul, *Indian Education*, 10 Ariz. L. Rev. 661 (1968) 17

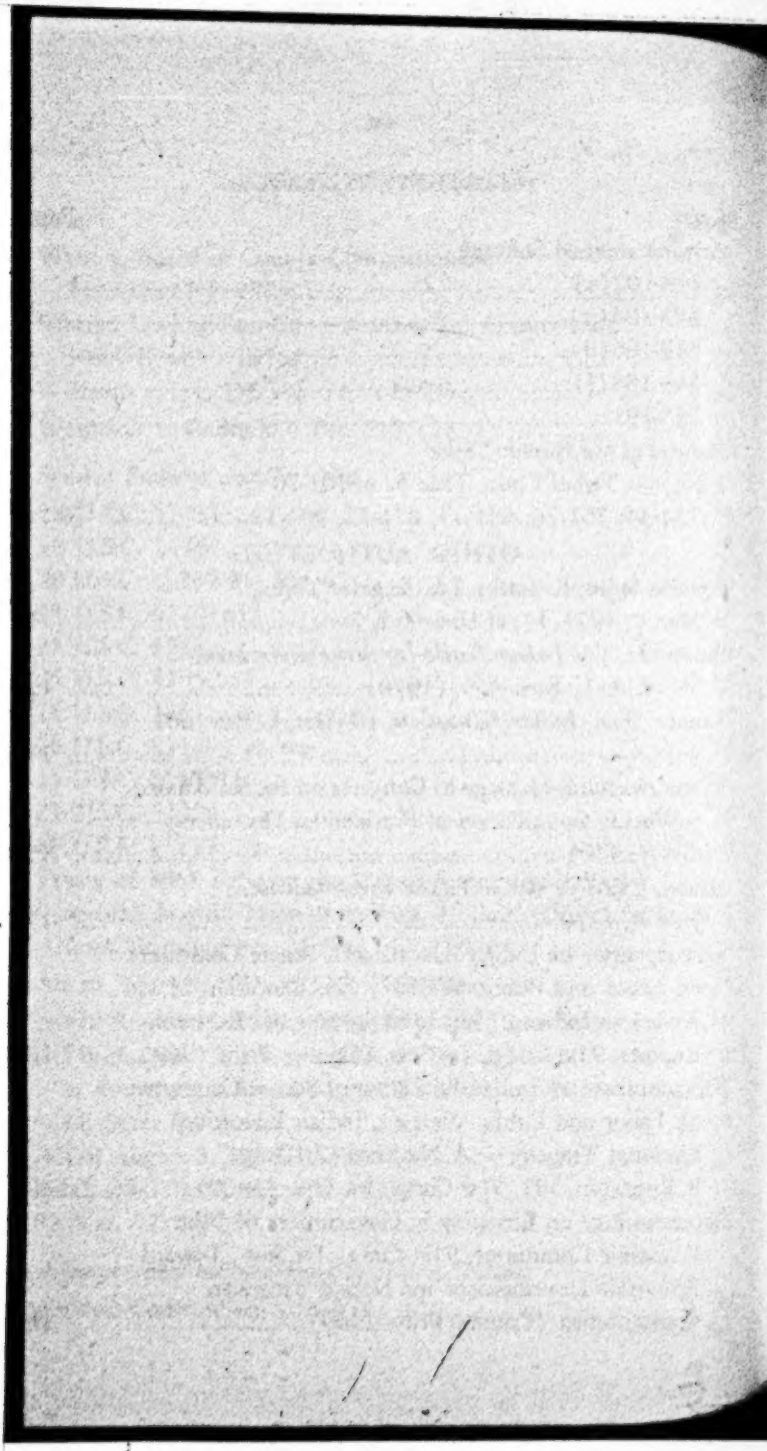
Nixon, Richard, Message to Congress on Indian Affairs, 6 Weekly Compliation of Presidential Documents, 883 (1970) 15

Nixon, Richard, White House Press Release, July 8, 1970 17

Subcommittee on Indian Education of Senate Committee on Labor and Public Welfare, The Education of American Indians, Field Investigation and Research Reports, 91st Cong., 1st Sess. (Comm. Print 1969) 17-18

Subcommittee on Indian Education of Senate Committee on Labor and Public Welfare, Indian Education: A National Tragedy — A National Challenge, S. Rept. No. 501, 91st Cong., 1st Sess. (1969) 17

Subcommittee on Economy in Government of Joint Economic Committee, 91st Cong., 1st Sess., Toward Economic Development for Native American Communities (Comm. Print 1969) 18



IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No._____

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated, *Appellant*, vs. ARIZONA STATE TAX COMMISSION, *Appellee.*	On Appeal from the Supreme Court of Arizona

JURISDICTIONAL STATEMENT

INTRODUCTORY

Appellant appeals from the judgment of the Supreme Court of Arizona entered on September 21, 1971, which denied appellant's petition for review of the judgment of the Arizona Court of Appeals on April 28, 1971 affirming the dismissal of the appellant's complaint by the Superior Court of the State of Arizona in and for the County of Apache on January 12, 1970. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

THE OPINIONS BELOW

The decision of the Supreme Court of Arizona denying review has not been reported, and appears herein as Appendix A. The opinion of the Arizona Court of Appeals is reported at 14 Ariz. App. 452, 484 P.2d 221, and appears herein as Appendix B. The opinion of the Superior Court is not reported, and appears herein as Appendix C.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a claim for refund of income tax paid during the calendar year 1967 brought under Ariz. Rev. Stat. Ann. §43-186(d) in the Superior Court of the State of Arizona in and for Apache County. Appellant contends that the assessment, imposition and collection of the Arizona state income is invalid because (1) she is a Navajo Indian; (2) she resided at all material times within the confines of the Navajo Indian Reservation; and (3) her income during 1967 was derived from sources within the Navajo Indian Reservation, making the state statute invalid because it conflicts with the Treaty of 1868 between the United States and the Navajo Tribe. The Superior Court dismissed her complaint, holding that the applicability of the Arizona income tax laws against her was not violative of the federal government's responsibilities as trustee for the Indians nor did it interfere with tribal self-government. On appeal, the Arizona Court of Appeals affirmed the Superior Court's dismissal holding that the Arizona income tax law was validly applied to plaintiff, despite the Treaty of 1868, and the Supreme Court of Arizona denied appellant's petition for review of the judgment of the Court of Appeals.

(ii) The judgment sought to be reviewed is the order of the Supreme Court of Arizona denying appellant's petition for review entered on September 21, 1971. No opinion was filed. The Notice of Appeal was filed in the Superior Court of the State of

Arizona in and for Apache County, the Court possessed of the record, on October 4, 1971.

(iii) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

Kennerly v. Montana District Court, 400 U.S. 423 (1971);

Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965);

Williams v. Lee, 358 U.S. 217 (1959);

The Kansas Indians, 5 Wall. 737 (1867);

Worcester v. Georgia, 6 Pet. 515 (1832);

Cherokee Nation v. Georgia, 5 Pet. 1 (1831).

(v) The validity of Ariz. Rev. Stat. §43-102(a), as applied to appellant, is here involved. The full text of that provision is as follows:

§43-102. Imposition of tax

(a) Taxes and rates — Individuals, estates and trusts. There shall be levied, collected, and paid for each taxable year upon the entire net income of every estate or trust taxable under this title and of every resident of this state and upon the entire net income of every nonresident which is derived from sources within this state, taxes in the following amounts and at the following rates upon the amount of net income in excess of credits against net income provided in §§43-127 and 43-128.

On the first one thousand dollars or any part thereof, two per cent (2%)

On the second one thousand dollars or any part thereof, three per cent (3%)

On the third one thousand dollars or any part thereof, four per cent (4%)

On the fourth one thousand dollars or any part thereof, five per cent (5%)

On the fifth one thousand dollars or any part thereof, six per cent (6%)

On the sixth one thousand dollars or any part thereof, seven per cent (7%)

On the seventh one thousand dollars or any part thereof, and all taxable income in excess of seven thousand dollars, eight per cent (8%).

13 Ariz. Rev. Stat. Ann. (1971-1972 Pocket Part, p. 132).

QUESTIONS PRESENTED

1. Does a state statute which, as applied, imposes and collects taxes from the income of an Indian residing at all times material within the exterior boundaries of the Navajo Indian Reservation, where such income was derived from sources within the Navajo Indian Reservation, violate the Treatry of 1868 between the United States and the Navajo Tribe, 15 Stat. 667?

2. Can the State of Arizona constitutionally apply a statute that imposes and collects taxes from the income of a Indian residing at all times material within the exterior boundaries of the Navajo Indian Reservation, where such income was derived from sources within the Navajo Indian Reservation, without express Congressional authorization?

STATEMENT OF THE CASE

Rosalind McClanahan, appellant herein, is a citizen of the United States and an enrolled member of the Navajo Tribe of Indians. During the 1967 calendar year, appellant resided within the exterior boundaries of the Navajo Indian Reseravtion, on that portion of the Reservation which is within the State of Arizona. Appellant's income during the 1967 calendar year was wholly derived from sources within the confines of the Navajo Indian Reservation. The total amount of tax withheld from appellant's income pursuant to Ariz. Rev. Stat. Ann. §43-188(f) amounted to $16.20. On April 1, 1968, appellant filed an Arizona State Individual Income Tax Return, a written protest against the collection of any tax on appellant's income by appellee, and a claim for refund for the entire sum withheld from her wages. No action was taken on appellant's claim for refund, so on October 4,

1968, appellant appealed her claim to appellee pursuant to Ariz. Rev. Stat. Ann §43-184(g). Appellee took no action on the claim. Thereafter appellant instituted a class action for refund in the Superior Court of Arizona in and for Apache County on June 17, 1969, pursuant to Ariz. Rev. Stat. Ann. §43-186(d). Appellee moved to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted. Appellee based its position on the following premises: (1) the imposition of the income tax does not interfere with the self-government of the Navajo Tribe of Indians; (2) the Arizona Enabling Act, 36 Stat. 557, 570 (1910) and the Arizona Constitution, Art. XX allow the State of Arizona to tax the income of Indians residing on a reservation; and (3) the Treaty of 1868 between the United States and the Navajo Tribe, 15 Stat. 667, does not contain any provision that would prohibit the imposition of the Arizona state income tax on that portion of the Navajo Indian Reservaion within the boundaries of the State of Arizona.

Appellant in responding to appellee's assertions, contended that (1) absent an Act of Congress, Arizona has no power to tax appellant's income; (2) such arrogation of the income-taxing power by appellee would be violative of the right to self-government conferred on the Navajo Tribe of Indians by the Treaty of 1868; (3) and the Arizona Enabling Act and Article XX of the Arizona Constitution do not deprive the Navajo Tribe of the exclusive power to tax Indians but rather preclude the state of Arizona from applying its income tax laws to Indians residing on the Reservation.

The Superior Court dismissed appellant's complaint on January 12, 1970, holding that the State of Arizona did not require express congressional authority to tax appellant, and that the income tax imposed and collected by appellee did not interfere with tribal self-government. Appellant noticed an appeal to the Court of Appeals of the State of Arizona that same day. The Court of Appeals affirmed the Superior Court's dismissal of the

complain on April 28, 1971, and held that Arizona could validly apply its income tax statute on Indians residing and working on the Navajo Reservation without violating the Treaty of 1868 or the Enabling Act of Arizona. *McClanahan v. State Tax Commission,* 14 Ariz. App. 452, 484 P.2d 221. On May 11, 1971, appellant moved for a rehearing, which was denied on June 8, 1971. Appellant then filed a petition for review by the Supreme Court of Arizona on June 22, 1971, and said petition was denied on September 21, 1971. Appellant filed the Notice of Appeal to the Supreme Court of the United States in the Superior Court, the court possessed of the record, on October 4, 1971.

THE QUESTIONS ARE SUBSTANTIAL

THE FEDERAL QUESTIONS PRESENTED BY THIS CASE COMPEL THE EXERCISE OF THIS COURT'S APPELLATE JURISDICTION BECAUSE THEY AFFECT THE VERY SUBSTANCE OF THE FEDERAL-STATE-INDIAN RELATIONSHIP.

There are approximately 127,054 Navajo Indians of whom 71,396 reside in the Arizona portion of the Navajo Indian Reservation. Letter from Melvin Wise, Chief of the Office of Information and Statistics, Bureau of Indian Affairs, Navajo Area Office, to Donald Juneau, December 16, 1971. The appellee herein, Arizona State Tax Commission, contends that it can tax the incomes of Indians residing on the Reservation where that income is wholly derived from sources on the Reservation. This contention is inconsistent with past decisions of this Court (1) which protect Indian tribal sovereignty, and (2) which debar state interference in Indian affairs because of federal preemption in the field. These two classes of decisions are conceptually and logically related as bases of an expressed federal policy of tribal sovereignty which excludes state action absent specific federal authorization. But to the extent that these interests are separable, the discussion *infra* will be concerned first with Indian tribal sovereignty, and second with federal preemption.

A. TRIBAL SOVEREIGNTY IS VIOLATED BY ARIZONA'S INCOME TAXATION OF RESERVATION INDIANS.

The opinion of the Arizona Court of Appeals upholding appellee's right to tax the income of reservation Indians conflicts with the body of federal case law defining the state-Indian relationship because the Court of Appeals failed to recognize that the taxation in question infringed on the federally-protected right of tribal self-government.

1. The Infringement Test

In *Williams v. Lee*, 358 U.S. 217 (1959), this Court formulated a test to determine the permissible scope of state activities on an Indian reservation. A non-Indian trader brought an action on account against a Navajo Indian in the Arizona Superior Court. The Arizona Supreme Court ruled that the Superior Court had jurisdiction. On certiorari, this Court reversed, and said:

> Essentially, absent governing Acts of Congress, the question has always been whether state action infringed upon the right of reservation Indians to make their own laws and be ruled by them.

359 U.S. at 220. The Court noted the absence of a governing act of Congress in that Arizona had not accepted jurisdiction under the Act of August 15, 1953, c. 505 §§6, 7, 67 Stat. 590. The Court further found that the tribal courts had "broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants." *Id.* at 222 (footnote omitted). It concluded "that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223.

In defining the parameters of tribal self-government for the purpose of its infringement test the Court relied on the 1868 Treaty between the United States and the Navajos, 15 Stat. 667, and the body of federal case law interpreting the scope of tribal sovereignty. Referring to the 1868 Treaty, the Court stated:

Implicit in these treaty terms . . . was the understanding that

> the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.

Id. at 222. Referring to the body of federal case law, the Court said:

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223. The proper application of the *Williams* test thus compels a recognition of the many incidents of tribal sovereignty protected by the federal courts.

2. Tribal Sovereignty and the Federal Courts

This Court forcefully acknowledged the existence of tribal sovereignty in the early years of the Republic. In *Worcester v. Georgia*, 6 Pet. 515 (1832) this Court held that Georgia criminal statutes were inapplicable within the boundaries of the Cherokee Nation because "[t]hey are in direct hostility with treaties, repeated in a succession of years, which mark out the boundaries that separate the Cherokee Country from Georgia . . . and recognize the pre-existing power of the nation to govern itself." 6 Pet. at 561, 562. Mr. Chief Justice Marshall, drawing upon his prior characterization of Indian tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831), concluded that the Cherokee Nation was "a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . " 6 Pet. at 561.

Cases subsequent to *Worcester* reiterated this Court's commitment to tribal sovereignty. In *The Kansas Indians*, 5 Wall. 737 (1867), the Court considered the conflicting claims of state power and Indian self-government. The State of Kansas asserted its taxing power over lands held in severalty by the Shawnee Indians which had been patented to them by the United States. The Court held that as long as the Kansas Indians existed as separate political entities, exercising the powers of self-government vested in them by their treaties with the United States, they would "enjoy the privilege of total immunity from state taxation." *Id.*

at 756. In *Ex Parte Crow Dog*, 109 U.S. 556 (1883), this Court affirmed another aspect of tribal sovereignty, holding that the Dakota territorial court did not have jurisdiction over an Indian for an alleged murder of another Indian in the Indian country. The criminal and civil jurisdiction was vested by the treaties in the Indian Tribes, giving the Indians "the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." 109 U.S. at 568. The Court also upheld tribal sovereignty over domestic relations, *United States v. Quiver*, 241 U.S. 602 (1916), and individual rights, *Talton v. Mayes*, 163 U.S. 376 (1896).

Last term, this Court again sustained Indian tribal sovereignty against state encroachment in *Kennerly v. Montana District Court*, 400 U.S. 423 (1971). The Court held that absent a vote by the members of the Blackfeet tribe and affirmative legislative action by the State of Montana, the state could not assume jurisdiction over the Blackfeet reservation under the Act of August 15, 1953, 67 Stat. 589.

Following the lead of this Court the lower federal courts have consistently sustained tribal sovereignty. *See, e.g., Maryland Casualty Co. v Citizens National Bank*, 361 F.2d 517 (5th Cir. 1966); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965), *cert. denied* 382 U.S. 986 (1966); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert. denied* 356 U.S. 960 (1958); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

The most recent example of the forthright adherence of the federal courts to the priciples of protected tribal sovereignty formulated by this Court is *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied* 396 U.S. 1003 (1970). In *Turtle*, the Ninth Circuit held that Arizona had no authority to extradite to Oklahoma an Indian living on the Arizona portion of the Navajo reservation. The Navajo Tribe was the only gov-

ernment with the power of extradition over Indians within the reservation boundaries. Analogizing the Tribe's extradition power to that of a state government, the court stated that the "power cannot now be assumed by or shared with the State of Arizona without "infring[ing] on the right of reservation Indians to make their own laws and be ruled by them.' . . ." 413 F.2d at 686.

Despite the unbroken line of authority going back over a hundred years, the Arizona Court of Appeals held that Arizona could validly extend its income tax laws over Indians residing and working on the Navajo Reservation. The Court misapplied the *Williams* test by stating that "the infringement referred to in *Williams v. Lee* . . . is not whether the Arizona state income tax infringes upon plaintiff's rights as an individual Navajo Indian, but whether such a tax infringes on the rights of the Navajo Tribe of Indians to be self-governing." 14 Ariz. App. at 454, 484 P.2d at 223. By finding that the income tax is an individual, personal matter, the court maintained that the paying of the income tax was not "an infringement of the Navajo Tribe's right of self-government." 14 Ariz. App. at 454, 484 P.2d at 223. By finding that the income tax is an individual, personal matter, the court maintained that the paying of the income tax was not an infringement of the Navajo Tribe's right of self-government. The maintenance of such a position is clearly untenable in light of the broad interpretation of tribal sovereignty by the federal courts.

Since the power to tax is an attribute of sovereignty, "essential to the very existence of government," *McCulloch v. Maryland*, 4 Wheat. 316, 428 (1819), it follows that an Indian tribe possessing the powers of self-government may levy and impose taxes. *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Iron Crow v. Oglala Sioux Tribe, supra; Buster v. Wright*, 135 F.947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906.) Although the Navajo Tribe has imposed license and privilege taxes, *see* 1 Navajo Tribal Code, Title 5, §§ 701-704; 731-734; 761-776; 841-843;

871-873; 901-912; no income tax has yet been enacted. This does not mean that the tribe has irrevocably waived or conveyed its taxing power to the State of Arizona. *Cf. Arizona ex. rel. Merrill v. Turtle, supra.* In addition, the question inevitably arises as to how Arizona proposes to collect delinquent taxes, pursuant to Ariz. Rev. Stat. Ann. § 43-191. *Cf. Commissioner of Revenue v. Brun,* 286 Minn. 43, 53, 174 N.W. 2d. 120, 126 (1970). Appellee's attempt to levy and collect income taxes on Indians living and working on the Navajo Reservation is a clear and direct infringement of Navajo Tribal Sovereignty, prohibited by *Williams v. Lee, supra.* Under an unbroken line of cases extending from *Worcester* to *Kennerly,* this Court has barred similar attempts to dilute or destroy such sovereignty.

Moreover, various state courts have followed this Court's lead in barring state taxation of Indian lands. *See, e.g., Sohol v. Clark,* ..... Wash. 2d ....., 479 P.2d (1971); *Pourier v. Board of Commissioners,* 83 S.D. 235, 157 N.W. 2d 532 (1969); *Makah Indian Tribe v. Clallam County,* 73 Wash. 2d 677, 440 P.2d 442 (1967). In the only other instance where a state supreme court considered the question of state income taxation of reservation Indians, the Minnesota Supreme Court delivered a well-reasoned opinion denying the state the power to extend income taxation onto an Indian Reservation. *Commissioner of Revenue v. Brun, supra.*

B. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE WELL-SETTLED DOCTRINE OF FEDERAL PREEMPTION IN THE AREA OF INDIAN AFFAIRS BECAUSE THE COURT UPHELD THE TAX IN QUESTION ABSENT ANY SHOWING OF EXPRESS CONGRESSIONAL AUTHORIZATION FOR ARIZONA TO LEVY AND COLECT STATE INCOME TAX FROM RESERVATION INDIANS.

It is an axiom of federal Indian law that Congress possesses "plenary power of legislation" with respect to Indian tribes.

Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899). Congressional plenary power derives from the Constitution, *Worcester v. Georgia,* 6 Pet. 515, 559 (1832); the "guardianship" of the United States over Indians, *Cherokee Nation v. Georgia,* 5 Pet. 1, 12 (1831); and the federal "ownership" of Indian land, *Johnson & Graham's Lessee v. McIntosh,* 8 Wheat. 240, 261 (1823). *See* Comment, *The Indian Battle for Self-determination,* 58 Calif. L. Rev. 445, 447-52 (1970). These sources of federal plenary power over Indian affairs have been buttressed by the moral obligation of the federal government recognized by this Court in *United States v. Kagama,* 118 U.S. 375 (1886):

> [The Indian Tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

118 U.S. at 384.

Where Congress acts pursuant to its plenary authority over Indian affairs, state action is absolutely precluded. In *Warren Trading Post Co. v. Arizona Tax Commision,* 380 U.S. 685 (1965), this Court held that Arizona could not tax the gross sales income of a trading post located on the Arizona portion of the Navajo Reservation. Finding that a comprehensive scheme of statutes and regulations had been set up in order to regulate traders, the Court stated:

> These apparently all inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.

Id. at 690.

Where *Warren,* drawing upon the long standing doctrine of federal preemption, forecloses state action where Congress has

acted, *Williams, supra,* controls state action in Indian affairs where Congress is silent. The *Williams* test precludes state action in the absence of "governing Acts of Congress," 358 U.S. at 220, where, as here, state action infringes upon tribal sovereignty.

State governments are thus clearly limited in their authority over Indian affairs to those areas specifically granted to the states by Congress. *See Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903). Only Congress can alter established federal Indian policy, *United States v. Daney,* 370 F.2d 791, 795 (10th Cir. 1966), and a state cannot *sua sponte* assert its jurisdiction over an Indian by conferring state citizenship and the right of suffrage upon him. *The Kansas Indians, supra* at 757; *United States v. Holliday,* 3 Wall. 407, 419 (1866).

Congress has granted the states jurisdiction in limited areas,[1] *see, e.g.,* 25 U.S.C. § 231 (health care); and has granted certain enumerated states civil and criminal jurisdiction by affirmative legislative action. Act of August 15, 1953, c.505, 67 Stat. 588, 589, *as amended* by the Act of August 24, 1954, c.910, 68 Stat. 795; Act of August 8, 1958, 72 Stat. 545, *amending* 18 U.S.C. §§ 1331, 1360. Arizona is not one of the enumerated states, and it has undertaken no affirmative legislative action to assume jurisdiction over the Arizona portion of the Navajo Reservation.

In justifying the tax in question here, a tax that directly infringes on the sovereignty of the Navajo Tribe; the obligation clearly rests with the state of Arizona to show congressional authorization for the state's action. It is significant that the court below did not cite any specific congressional act in support of Arizona's tax of reservation Indian income. The court of appeals dismissed *Warren,* stating that it found "no corresponding preemption of

---

[1] Where Congress does allow a state to exercise limited jurisdiction on an Indian Reservation, such exercise is strictly construed in favor of the Indians. *United States v. Forness,* 125 F.2d 928 (2d Cir.) *cert. denied sub nom. City of Salamanca v. United States,* 316 U.S. 694 (1942). *Cf. Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970); *Choate v. Trapp,* 224 U.S. 665, 675 (1912).

the field of taxation by Congress to make this reasoning germaine to the taxation of Navajo Reservation Indians by the State of Arizona." 14 Ariz. App. at 455, 484 P.2d at 225. The court thus overlooked the clear *Williams'* requirement of affirmative congressional authorization and assumed that silence bespeaks consent despite the well-settled principle of federal law that the non-exercise of power in a field preempted by the federal government forecloses state action in that field absent express congressional authorization. *Guss v. Utah Labor Board*, 353 U.S. 1 (1957).

The absence of congressional authorization for state taxation of Indians is especially significant in view of the wide variety of state taxation of Indian property struck down by this Court. *Board of Commissioners v. Seber*, 318 U.S. 705 (1943) (real estate tax on trust lands); *Carpenter v. Shaw*, 280 U.S. 363 (1930) (tax on allottees' oil and gas royalties); *Ward v. Board of County Commissioners*, 253 U.S. 17 (1920) and *Choate v. Trapp*, *supra*, (real property tax on allotments); *United States v. Rickert*, 188 U.S. 432 (1903) (tax on fixed and permanent improvements on allotted lands).

The two cases cited by the lower court as authority for state taxing power over Indians, *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1936), and *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936), dealt with situations that are totally distinguishable from the situation of members of the Navajo Tribe. *Leahy* upheld a state income tax on the tribal income of an Osage Indian. The Court's opinion was perfunctorily based up on *Choteau v. Burnet*, 283 U.S. 691 (1931), a case upholding federal income tax on the income of a tribal Indian. The *Choteau* holding turned on two central factors that are inapplicable given the present situation of tribal Indians.

First, at the time *Choteau* was decided, federal Indian policy was conducted pursuant to the assimiliationist Indian Allotment Act. The *Choteau* Court found that federal policy contemplated

Indians becoming land-owning citizens and taxpayers of the United States:

> The course of legislation disclosed that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property including the duty to pay taxes.

283 U.S. at 694. The assimilationist policy that persuaded the Court in *Choteau* and in turn provided the basis for the *Leahy* case no longer exists. Act of June 18, 1934, c. 576, § 1, 48 Stat. 984, 25 U.S.C. § 461 (1964). The allotment system has been repudiated by the President of the United States. Indian Affairs, The President's Message to the Congress, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 883 (1970).

Second, the Indian involved in both the *Choteau* and *Leahy* cases held a trust patent, the trust on which had run under federal law. He thus became obligated to pay federal tax by the terms of his trust patent itself. This situation, also pivotal in *Choteau* and *Leahy*, is far removed from the situation of the vast majority of Navajos.

In *Oklahoma Tax Commission*, this Court, in upholding an Oklahoma state estate tax levied on restricted Indian personal property, carefully pointed out the special situation of the Oklahoma Indians involved in the case. 319 U.S. at 603-604. The Court found little effective tribal government; all of the benefits of government were provided by the State of Oklahoma, therefore the Indians should pay for the benefits the state provided. *Id.* at 609. The case was decided wholly on a benefit-burden theory of taxation, a theory inapplicable to the Navajo Tribe. The Navajo Tribe has an effective court system, recognized by this Court, *see Williams v. Lee*, *supra*, at 222, that alleviates state court calendars with no cost to the state. The Tribe has its

own police force (the largest tribal force in the United States), its own anti-poverty office (Office of Navajo Economic Opportunity), and its own welfare program (emergency relief and chapter-sponsored work projects). Many other endeavors are either aided or wholly underwritten by the federal government.[2] The *ratio decidendi* of the two cases cited by the Arizona Court of Appeals thus does not contemplate the situation presented by the case at bar.

Not only has Congress not authorized *sub silentio* Arizona to tax the income of Navajos living and working on the reservation, but recent congressional legislation evidences a clear intent to strengthen Indian tribes, encourage the type of tribal activities mentioned above, and assist them in their struggle for self-determination. This recent legislation is the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. §§ 1301 *et seq.* Last term, this Court construed §§ 403 and 406(b) of the Act, Stat. 79, 80, 25 U.S.C. §§ 1323(b) and 1326, in *Kennerly v. Montana District Court*, 400 U.S. 423 (1971). In *Kennerly*, the Court found that Montana had not affirmatively assumed civil jurisdiction over the Blackfeet Reservation. Nor had the Blackfeet Tribal Council conferred upon Montana civil jurisdiction over the reservation by enacting a resolution declaring that the state courts of Montana had concurrent jurisdiction with the Tribal Courts. The Court held that a referendum of tribal members was required to confer such jurisdiction under the Indian Civil Rights Act, *supra*, and "[l]egislative action by the Tribal Council does not comport with the explicit requirements of the Act." 400 US. at 429 (footnote omitted). The Navajo Tribe has not even raised the possi-

---

[2] *E.g.*, most of the roads on the reservation are maintained by the Tribe and the Bureau of Indian Affairs, and state schools serving Indians are substantially financed by federal money. *See* 25 U.S.C. §§452-455 (Johnson-O'Malley Act); 20 U.S.C. §§239; 631-645 (Impact Aid for schools); Pub.L. 85-470, 72 Stat. 834 (1958) (highways); 23 U.S.C. §120 (a) (95% of highway costs on Indian Reservations paid by federal government).

bility of concurrent state jurisdiction, much less seriously considered a referendum on the question.

CONCLUSION

The federal questions presented by the Arizona Court of Appeals decision in *McClanahan v. State Tax Commission* concern the very existence of Indian tribal government within the federalist system. The foregoing analysis shows that the lower court's opinion directly controverts the unbroken line of decisions wherein this Court has preserved Indian tribal sovereignty and sustained federal preemption in Indian affairs. What is a stake here is more than an abstract principle of political science. The self-governing Indian tribes require protection if they are to fully determine their economic destinies.

The vision of Indian self-government remains the one bright light in the history of the United States' dark history in dealing with the first Americans, a history all too often punctuated with perfidy by the government of this nation. Through the years, often in times of deep public antipathy toward the Indian, this Court, indeed the entire federal judiciary, has championed that vision of self-government. Indians have lately found additional exponents of self-determination in the executive branch[3] and in Congress,[4]

---

[3] President Nixon said on July 8, 1970: "This then, must be the goal of any new national policy towards the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community." White House Press Release, p. 2. Vice President Agnew, on March 8, 1971, said: "We in this Administration believe in giving you control over what you have. The reservations are your lands. The lives you lead on them are your lives. The federal government has obligations to provide financial support. But you should establish the priorities, you should allocate the funds, you should guide the projects * * *." Los Angeles Times, Mar. 9, 1971, §1, at 16, cols. 1, 2.

[4] *See, e.g.*, Fannin, *Indian Education*, 10 Ariz. L. Rev. 661 (1968); Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare, Indian Education: A National Tragedy—A National Challenge, S. Rept. No. 501, 91st Cong., 1st Sess. 9-21 (1969); Subcommittee on Indian Education of Senate Committee on Labor and Public Welfare, The Education of American Indians, Field Investigation and

but they still look to this Court for assurance that the vision will remain a reality.

In order to grow and progress, Indian tribes need revenue for education and economic development. The intrusion of a state into the Indian taxing sphere would make it that more difficult for a tribe to secure its needed revenue. In view of the grinding poverty on Indian reservations, treble taxation by federal, state and tribal governments would be an insupportable burden on the Indian taxpayer. *See Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 690 (1965). The federal courts have recognized the need for easing the tax burden on Indians by affording them federal tax exemptions. *See, e.g., Squire v. Capoeman* 351 U.S. 1 (1956) (no capital-gains tax on proceeds from sale of timber on allotted land); *United States v. Dancy*, 370 F.2d 791 (10th Cir. 1966) (no income tax on bonus given Indian for oil and gas lease on allotted land); *Big Eagle v. United States*, 300 F.2d 765 (Ct. Cl. 1966) (no income tax on royalty income from tribal mineral deposits). The purpose of tax exemptions is to encourage the tribal Indians to become self-sufficient in the development and use of resources of the reservation. *Donahue v. California Justice Court*, 15 Cal. App.3d 579, 93 Cal. Rptr. 310 (1st Dist. 1971). This self-sufficiency is imperilled by Arizona's attempt to collect income taxes of Indians living and working on the Navajo Reservation, and plaintiff asks this court on behalf of her people to protect the Tribe's sovereignty — a duty which has invariably been recognized "by this court whenever the question has arisen." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

Research Reports, 91st Congress, 1st Sess. (Comm. Print 1969); Subcommittee on Economy in Government of the Joint Economic Committee, 91st Cong., 1st Sess., Toward Economic Development for Native American Communities (Comm. Print 1969).

Respectfully submitted,

DONALD JUNEAU
THEODORE R. MITCHELL
Attorneys for Appellant

Dated: December, 1971

Of Counsel:
BRUCE BRIDEGROOM
STEPHEN HARVEY

APPENDIX A

SUPREME COURT

STATE OF ARIZONA

PHOENIX

85007

September 22, 1971

ROSALIND McCLANAHAN, Individually and On Behalf of All Others Similarly Situated, Appellant, vs. THE STATE TAX COMMISSION OF ARIZONA, Appellee.	No. 10576-PR (Supreme Court) No. 1 CA-CIV 1316 (Court of Appeals) No. 4370 (Apache County)

The following action was taken by the Supreme Court of the State of Arizona on September 21, 1971 in regard to the above-entitled cause:

"ORDERED: Petition for Leave to File Amicus Curiae Brief — GRANTED.

FURTHER ORDERED: Petition for Review — DENIED."

Record returned to the Court of Appeals, Division One, this 22nd day of September, 1971.

CLIFFORD H. WARD, Clerk

APPENDIX B

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

1 CA-CIV 1316
DEPARTMENT B

Appeal from the Superior Court of Apache County

Cause No. 4370

The Honorable D. L. Greer, Presiding

AFFIRMED

Dinebeiina Nahiilna Be Agaditahe — Window Rock

By Theodore Mitchell
Bruce Bridegroom
Donald Juneau

Attorneys for Appellant
Gary K. Nelson, — Phoenix

The Attorney General
By James D. Winter,
Assistant Attorney General

Attorneys for Appellee
JACOBSON, Presiding Judge

Are Navajo Indians, living and working within the confines of that portion of the Navajo Indian Reservation lying within the State of Arizona, subject to the Arizona State Individual Income Tax laws?

Plaintiff-appellant, Rosalind McClanahan, brought an action

in Apache County, Arizona, on behalf of herself and all others similarly situated,[1] against the State Tax Commission of Arizona, seeking a refund of $16.20 withheld by her employer during the taxable year of 1967 as Arizona income tax, against which the State of Arizona claimed an alleged tax liability of $11.84. Plaintiff's complaint alleged that she is a Navajo Indian and that at all times during the tax year 1967 she resided on, and all her income for that year was derived from sources within the confines of, the Navajo Indian Reservation. By reason of her status and the source of her income, plaintiff contends he is not subject to the assessment, collection or retention of the Arizona tax on income collected under the authority of ARS § 43-101 et seq.[2]

The defendant State Tax Commission filed a motion to dismiss for failure to state a claim for relief pursuant to Rule 12(b), Rules of Civil Procedure, which was granted. Plaintiff appealed from the judgment of dismissal of her complaint.

For the purposes of this appeal, we must consider the facts pled in plaintiff's complaint as true. Lakin Cattle Co. v. Engelthaler, 101 Ariz. 282, 419 P.2d 66 (1966).

Plaintiff does not contend that she is not a "resident" of the State of Arizona, within the meaning of the Arizona state tax law, but bases her theory of non-taxability by the State of Arizona primarily upon the oft-quoted pronouncement of the United States Supreme Court in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832):

"The Cherokee (Navajo) Nation . . . is a distinct community occupying its own territory . . . in which the laws of Georgia (Arizona) can have no force."

---

[1] It not being necessary for a determination of the issues in this matter to determine whether plaintiff may properly under our statutes maintain this as a class action, we decline to do so. *See* Rule 23, Ariz. R. Civ. P.

[2] ARS §43-102 A, as amended, provides in part:

"There shall be levied, collected, and paid for each taxable year upon the entire net income of . . . every resident of this state . . . taxes in the following amounts . . . "

However, it is generally conceded, even by the plaintiff here, that the relationship of the Indian, be he reservation oriented or otherwise, to the rest of the citizens of the United States and to the states themselves, has drastically changed in the approximate 140 years since Worcester v. Georgia. This changed relationship has been reflected in decisions delineating the State-Indian status.

> "Over the years this original concept of tribal sovereignty has been modified to permit application of state law to reservation Indians in matters not considered essential to tribal self-government, but the basic principle that the Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation, has remained." Arizona v. Turtle, 413 F.2d 683 (9th Circuit 1969), cert. denied, 396 U.S. 1003, 24 L.Ed. 2d 1494 (1970). (emphasis added).

To determine the effectiveness of state laws on reservation Indians ". . . the question has always been whether the state action infringed on the right of the Reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959). Williams also speaks in terms of "the internal affairs of the Indians" remaining "exclusively" within the jurisdiction of the tribal government.

It is also apparent from reading the State-Indian cases, that the extent of control that a state may exercise over Indians residing within its borders is in direct relationship to the amount of tribal government in existence which could affect that Indian. Thus, in Leahy v. State Treasurer of Oklahoma, 297 U.S. 420, 56 S. Ct. 507, 80 L. Ed. 771 (1936) and in Oklahoma Tax Commission v. United States, 319 U.S. 598, 63 S. Ct. 1284, 87 L. Ed. 1612 (1943), the State of Oklahoma was allowed to impose a state tax on a pro rata share of tribal income and an estate tax on Indians' estates where "these Indians have no effective tribal autonomy . . . and . . . are actually citizens of the State with little to distinguish them from all other citizens except for their

limited property restrictions and their tax exemptions." Oklahoma Tax Commission v. U. S., supra.

Likewise, Alaska state fishtrap laws were applied to the Metlakatla Indians who have no reservation in the self-government sense because "the principle of Indian national sovereignty enunciated in Worcester v. Georgia . . . does not apply to them." Metlakatla Indian Community v. Egan, 369 U.S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962).

A like result was reached in Organized Village of Kake v. Egan, 369 U.S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962), dealing with non-reservation Indians.

Applying the rationale of these decisions it is apparent that the infringement referred to in Williams v. Lee, supra, is not whether the Arizona state income tax infringes on plaintiff's rights as an individual Navajo Indian, but whether such a tax infringes on the rights of the Navajo Tribe of Indians to be self-governing. In making this determination, we must first make an analysis of the nature of a net income tax. A workable analysis was first expressed in Black on Income and Other Federal Taxes (Fourth Edition) as quoted in Poorman v. State Board of Equalization, 99 Montana 543, 45 P.2d 307 (1935):

"'An income tax is distinguished from other forms of taxation in this respect: that it is not levied upon property, nor upon the operations of trade or business or the subjects employed therein, nor upon the practice of a profession or the pursuit of a trade or calling, but upon the acquisitions of the taxpayer arising from one or more of these sources, or all combined, annually or at other stated intervals, and generally, but not necessarily, upon only the excess of such acquisitions over a certain minimum sum.'"

An income tax has been said to be a personal tax, Pennsylvania Cement Co. v. Bradley Contracting Co., 274 F. 1003 (S.D.N.Y. 1960), assessed upon the income of the person. Young v. Illinois Athletic Club, 310 Ill. 75, 141 N.E. 369 (1923).

Because of the nature of a net income tax we are not per-

suaded by the reasoning of those cases dealing with the attempt by the state to control or affect Indian real property. See The Kansas Indians, 72 U.S. (5 Wall.) 737, 18 L. Ed. 667 (1866); Your Food Stores, Inc. (NSL) v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (1961).

Having previously determined that the prohibition against applying state law to reservation Indians was not intended as a prohibition against individual infringement, but deals with interference with tribal autonomy we have no difficulty in holding that the fact that the plaintiff is a Navajo Indian and is required to pay a personal tax, does not in and of itself make such a tax ineffective. Nor do we believe the fact that plaintiff as a Navajo Indian is required to pay the income tax on income derived solely from sources within the reservation results in an infringement on the Navajo tribe's right of self government. In determining whether such an infringement exists, we are aded by an examination of those early cases dealing with the federal-state dichotomy of income taxation. Thus, as was held in Helvering v. Gerhardt, 304 U.S. 405, 58 S. Ct. 969, 82 L. Ed. 1427 (1938), when dealing with the problem of whether state employees were required to pay federal income taxes and the extent that such taxation infringed upon the sovereignty of the state:

> "Even though, to some unascertainable extent, the tax deprived the state of the advantage of paying less than the standard rate for the services which they engaged, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states.
>
> "[W]e decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government." (emphasis added)

Likewise, the corresponding right of a state to levy an income tax upon an employee of the federal government was upheld in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927 (1939). This case, in attempting to deter-

mine whether the State income tax infringed upon the sovereignty of the Federal Government, stated:

"The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the (United States Government), or its property or income, nor is it paid by the . . . government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable (citations omitted)." (emphasis added)

If then, an income tax by the Federal Government or a state upon the employee of the other does not interfere with the essential function of the government whose employee is being taxed, how can it be seriously argued that an income tax by the State of Arizona upon a Navajo Indian, regardless of his employer, causes an impairment of the right of the Navajo tribe to be self governing? We believe it cannot. Nor are we dissuaded from this proposition by Warren Trading Post Co. v. Arizona State Tax Comm., 380 U.S. 685, 85 S. Ct. 1242, L. Ed. 2d 165 (1965) relied upon by plaintiff. This case held that the State of Arizona could not impose a gross sales tax upon the privilege of operating a trading post within the confines of the Navajo Reservation. In our opinion, the rationale of that decision was that the Federal Government by licensing Indian traders and regulating them "has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." We find no corresponding preemption of the field of taxation by Congress to make this reasoning germane to the taxation of Navajo reservation Indians by the State of Arizona.

Plaintiff likewise argues that the Arizona Enabling Act (§ 20, 36 Stat. 569) and the Arizona Constitution (Art. XX, Fourth)

require a ruling that Navajo Indians are not subject to Arizona State income taxes. The language of the Enabling Act and the Constitution is the same and is as follows:

> "The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall be been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

We do not believe that this language defeats the tax in question for two reasons. First, the prohibition deals with disclaimer of title to land owned or held by an Indian or an Indian tribe, and as we have previously discovered, an income tax is not a tax on real property. By the imposition of the income tax here involved, the State of Arizona is not asserting any ownership or proprietary interest in Indian lands. Second, as was pointed out in Organized Village of Kake v. Egan, 369 U.S. 60, supra, the "absolute jurisdiction and control" language of the Act and Constitution was "not intended to oust the state completely from regulation of Indian 'property' . . ." Thus "state laws may be applied to Indians unless such application would interfere with reservation self government or impair a right granted or reserved by federal law," 369 U.S. at 75, regardless of the prohibition and disclaimer language of the Constitution and Act.

This then brings us to the two jurisdictions which have been faced with this exact problem. In Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (1969), the New Mexico Court of Appeals held that the State of New Mexico could validly tax the income of reservation Indians earned on the reservation. However in that decision the parties stipulated that the tax involved would not constitute an infringement upon tribal rights. Therefore, while we agree with a great deal of what is stated in that

opinion, we do not find the decision of great assistance in resolving the issues at hand.

The Supreme Court of Minnesota in the case of the Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970) came to exactly the opposite conclusion, holding that the State of Minnesota could not impose its income tax on a member of the Red Lake Band of Chippewa Indians who was employed at a tribal sawmill within the confines of the Reservation. On the crucial issue of infringement the Court held:

"It cannot be argued that siphoning off part of the earnings from employees of a sawmill operated for the benefit and welfare of enrolled members of the tribe does not interfere with the tribal rights of self-government.

Apparently the Minnesota Court is either holding that an income tax is a tax on the source of income, which has been expressly discredited or it is assuming that an income tax is a tax on property, which is also incorrect. In any event, the mere statement that an income tax is an infringement, without analyzing the issue, does not make it so. For this reason we disagree with the Minnesota Court.

At time of oral argument counsel for plaintiff conceded that tax monies of the State of Arizona were being expended for education and welfare within the confines of the Navajo Reservation and that Navajo Indians were the beneficiaries of these expenditures. This fact is mentioned merely to point out that one of the fundamental concepts of governmental sovereignty is the obligation to provide services with the corresponding right to tax its "residents" to pay therefor.

For the reasons herein stated, it is our opinion that because of the nature of an income tax, its imposition upon income earned by a reservation Indian from sources within the reservation is not an infringement of the right of self- government by the tribe of which the taxpayer is a member and therefore such a tax is a

valid exercise of a state law within the confines of the Indian reservation.

The judgment of the trial court is affirmed.

EINO M. JACOBSON, Presiding Judge

CONCURRING:

LEVI RAY HAIRE, Judge

MORRIS ROZAR, Judge of the Superior Court

NOTE: Judge William E. Eubank, having requested that he be relieved from consideration of this matter, Judge Morris Rozar, Maricopa County Superior Court, was called to sit in his stead and participate in the determination of this decision.

APPENDIX C

IN THE SUPERIOR COURT
IN AND FOR APACHE COUNTY
STATE OF ARIZONA

No. 4370

ROSALIND McCLANAHAN, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

THE STATE TAX COMMISSION OF ARIZONA,

Defendant.

(Filed: January 23, 1970)

AMENDED OPINION AND ORDER

The right of the State of Arizona to tax members of the Navajo Tribe has returned like Banquo's ghost to challenge this Court. Indeed, to be resolved are some fundamental questions concerning the relationship of the Navajo Tribe members to this Sovereign State.

In her complaint, Plaintiff alleges that she is a Navajo Indian, residing on the Navajo Indian Reservation; that during the year 1967 the State of Arizona taxed her income — income derived from sources within the Reservation. Plaintiff also alleges residence in Apache County, Arizona.

Defendant has filed its Motion to Dismiss; for purposes of this Motion the facts as alleged are taken to true. *Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 419 P.2d 66.

In *Warren Trading Post v. The Arizona Tax Commission*, 380 U.S. 685, 14 L. Ed. 2d 165, 85 S. Ct. 1242, Justice Black while holding the Arizona State Tax Commission powerless to impose a sales tax against a trader on the Navajo Reservation, discussed grants made by the United States Government for its wards, for roads, education, and other services, and further stated:

> "Since Federal legislation has left the State with no duties or responsibilities respecting the Reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax".

It is therefore appropriate, preliminarily, to discuss provisions made by the State of Arizona for its Navajo residents in Apache County.

Navajo Tribal members who are residents of Arizona are entitled to all benefits to which other residents are entitled. His right to bear arms and to consume alcoholic beverages has been recognized and affirmed by recent legislation. His right to sue in State courts was determined in *Begay v. Sawtelle*, 53 Ariz. 304 (1939), 88 P.2d 999. By *Fernandez v. State*, 16 Ariz. 269, 144 Pac. 640 (1914), the Indian living on a Reservation was adjudged to be competent as a witness in judicial proceedings. In *Bradley v. Arizona Corporation Commission*, 60 Ariz. 508 (1943), 141 P.2d 524, the Supreme Court of Arizona upheld the constitutional right of a tribal Indian to sue and obtain a certificate of convenience and necessity for operation of a motor vehicle as a contract carrier.

The zenith of Arizona judicial responsibility arrived in *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456, when Justice Udall, who presided in this Court for many years, held, in reversing *Porter, v. Hall*, 34 Ariz. 308, 271 P. 411 (1928), that a tribal Indian could vote in State and Federal elections. The case also affirmed that Indian tribes residing on Indian Reservations are residents of the State of Arizona. In every term of this Court many Navajos are called in to serve as jurors.

No cases have been cited holding that the State may not impose an income tax on the Plaintiff.

The thrust of the Defendant's argument is twofold: (1) Arizona has not power to tax income of the Plaintiff absent an Act of Congress expressly confering such power, and (2) the State has no power to tax the income of Plaintiff because to do so would interfere with the powers essential to self-government of the Navajo Tribe.

We have reviewed all the authorities cited by counsel, and have made additional research, and find that the best summary of all the U.S. Supreme Court decisions affecting the case at bar is *State of Arizona ex rel Edgar Merrill v. Wayne Turtle*, 413 F.2d 683 (9th Cir., 1969), wherein Judge Madden stated,

"The relationship between the Navajo Tribe, the United States and the State of Arizona has previously been considered by the Supreme Court in *William v. Lee*, 358 U.S. 217 (1959) and by this court in *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965). The history reviewed by the courts in these cases discloses that historically the Indian tribes were regarded as distinct political communities, protected by treaty from the laws of any state and subject only to the plenary power of Congress over Indian affairs. See *Worcester v. Georgia*, 31 U.S. 515 (1832); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Kagama*, 118 U.S. 375 (1886). Over the years this original concept of tribal sovereignty has been modified to permit application of State law to reservation Indians in matters not considered essential to tribal self-government, but the basic principal that the Indian tribes retain exclusive jurisdiction over essential matters of reservation government in the absence of specific Congressional limitation, has remained. 'Essentially, absent governing Act of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them'." 413 F.2d at 684.

* * *

"As indicated above, the historical development of this principle down to its contemporary formulation in *Williams* pro-

hibits the State of Arizona in the absence of specific Congressional authorization from extending its laws or process to the Navajo Reservation if to do so would interfere with tribal self-government or impair a right granted by federal law". 413 F.2d at 685.

As similarly stated in *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L. Ed. 2d 573, 82 S. Ct. 562 (1961),

"[I]'n the absence of a limiting treaty obligation or congressional enactment, each State had a right to exercise jurisdiction over Indian Reservations within its boundaries". 369 U.S. at 75, as quoted from another case.

From an examination of *Turtle*, and the cases therein cited, we conclude that the State does not require express congressional authority to exercise jurisdiction over Plaintiff.

The second point raised is whether, by taxing Plaintiff, the state interferes with self-government of the Navajo Tribe or rights reserved by Federal law. In *Brun v. Commissioner of Taxation*, Docket No. 1375, dated April 22, 1968, the tax court of Minnesota held that a number of the Red Lake Band of Chippewa Indians employed at a sawmill on said reservation, over which the State had no civil or criminal jurisdiction, was liable for payment of State income tax imposed by Minnesota. The Court held,

"It is the opinion of this Court that Minnesota does have sufficient jurisdiction over the Red Lake Reservation and the Red Lake Band of Chippewa Indians to levy State income taxes on income earned by members of the Band from employment on the Reservation. *In regard to the particular appellant, it is further our opinion that the imposition of State income taxes would not interfere with Tribal self-government*". (Emphasis supplied.)

In *State Tax Commission v. Barnes*, 178 N.Y.S. 2d 932 (1958), the New York Court held,

'In my opinion the approval of the United States has never been necessary in order to allow the State of New York to impose taxes on Indians".

It went on to say,

"The fact that the Indians reside of the Reservation or elsewhere does not affect their liability to pay State income taxes, so long as they are residents of New York".

The Court also held that the tax was sustained even though the land on the Reservation was not subject to State or local real property taxes, and even if the State obtained a judgment for unpaid taxes of any kind, including income taxes, the State could not levy execution against the land on the Reservation. This opinion was affirmed in *Powless v. State Tax Commision of New York*, 253 N.Y.S.2d 438 (1964).

In *Leahy v. The State Treasurer of Oklahoma*, 49 P.2d 570 (1935), which was later affirmed by the United States Supreme Court, 297 U.S. 420, 80 L.Ed 771 1936), the Oklahoma Supreme Court held,

"It is plain that the income here in question was free from government restrictions, and was not subject to control by any Federal agency; therefore, a tax levied by the State could not be a direct burden upon a governmental instrumentality, and could not be termed an interference by the State with the operations of Federal government".

In *Ghabate v. Bureau of Revenue*, 451 P.2d 1002 (1969), the New Mexico appellate court found that imposition of the New Mexico State income tax did not interfere with Reservation self-government on the Zuni Reservation. This case is particularly significant, not only because of the almost identical factual situation as the case at bar, but the State of New Mexico has an Enabling Act identical to that of the State of Arizona. The New Mexico court discussed and met most of the contentions raised by counsel for the Plaintiff here, holding that New Mexico could impose the tax against Zuni Indians, notwithstanding the fact that the State had not assumed jurisdiction over Reservation Indians and in spite of the disclaimer set forth in its Enabling Act.

From the above cases we conclude that imposition of the Ari-

zona income tax on Plaintiff does not interfere with Tribal self-government of the Navajo Tribe.

The United States Supreme Court held in *Choteau v. Burnett*, 283 U.S. 967, 75 L.Ed. 1353 (1931), that a member of the Osage Tribe is liable for Federal income tax. Plaintiff is also subject to Federal income taxes. *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956); *Holt v. C.I.R.*, 364 F.2d 38 (1966).

By imposition of an income tax on Indians, Arizona does not pre-empt nor preclude the Navajo Tribe from imposition of its own income tax. Indeed, the Navajo, in payment of State, Federal and Tribal taxes would be no different from other taxpayers paying city, state and Federal taxes. We find no interference with Tribal self-government. Instead, we find that imposition of the tax is in the long run beneficial to the Navajo, and may well speed up the full integration into our political, social and economic culture.

Finally, we have endeavored in this decision to avoid the pitfall mentioned by Aristotle when he said,

> "They who take only a few points into account find it easy to pronounce sentence."

But it does appear, essentially, that this is a matter between the sovereign State of Arizona and one of its citizens. Justice Brandeis stated in *Leahy, supra,*

> "As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxed also by the State."

The Motion to Dismiss, heretofore filed by the Defendant State Tax Commission of Arizona, be and is hereby granted.

DATED this 12th day of January, 1970.

/s/ D. L. GREER
D. L. Greer
Judge of the Superior Court